STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS

ROBERT MARTIN and CATHY MARTIN,

Plaintiffs-Appellees,

v.

S. C. No 120932
C.A. No. 22290
L.C. No. 98 007800CH

DAVID A. BELDEAN, et. al.

Defendants,

and

JOHN R. REDMOND and BARBARA E. REDMOND, EDWARD DAVIES and KAREN A. DAVIES, SAMUEL D. BRANDT and LOIS A. BRANDT,

Defendants-Appellants.
_____/

APPELLANTS' REPLY BRIEF

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I. REGARDLESS OF THE NATURE OF THE RIGHTS APPELLANTS OBTAINED UNDER THE PLAT, THOSE RIGHTS CAN ONLY BE EXTINGUISHED PURSUANT TO THE PLAT ACTS.

Appellees argue strenuously that Appellants have misread the Court of Appeals decision regarding the nature of the interest that Appellants received in Outlot A under the Tan Lakes Subdivision plat. Appellants agree with Appellees that the Court of Appeals held that Appellants did not receive a fee simple interest in Outlot A; the Court instead found that Appellants received a right to the use of Outlot A. However, as Appellants argued in their Brief on Appeal, the Court of Appeals was incorrect in its determination that private dedications are not permitted under Michigan's Plat Acts. As to this issue, Appellants rely on the analysis set forth in their Brief on Appeal.

Where Appellees err in their Brief, however, is in their assumption that the nature of the right granted by a plat somehow determines how that right can be extinguished. An easement established by a plat, however, has "all of the force of any other express grant." Rose v Green, 1999 WL 33444353 (Mich App Dkt No. 206524, 5/18/99) It is treated as are all other rights established under the plat. Under the Plat Acts, those rights created by a plat – whether an easement or a fee simple ownership interest –can only be modified or extinguished through the vacation procedures set forth in the Act. The Plat Act (now the Land Division Act) is the sole remedy for anyone who wishes to assert rights contrary to those established by an existing plat. Binkley v Asire, 335 Mich 89, 96; 55 NW2d 742 (1952); Hall v Hanson, 2003 WL 271317 (Mich App Dkt Nos

222800, 222803, 2/7/03) If, as Appellees argue, Appellants were granted rights – even if that right was only a right to use Outlot A – under the Tan Lakes plat, then Appellees can only extinguish those rights through the procedures set forth in the Land Division Act. Instead, contrary to the law, Appellees sought to extinguish Appellants' rights in an action for equitable relief. Based upon this alone, the decision of the Court of Appeals should be reversed.

II. THE TAN LAKE RESTRICTIVE COVENANTS DO NOT LIMIT APPELLANTS' RIGHT IN OUTLOT A CREATED BY THE TAN LAKE PLAT

Appellees continue to insist that, because they were signed and recorded on the same day, the Tan Lake plat and the Tan Lake Deed Restrictions must be read as a single document. This assertion is simply wrong. Also incorrect is Appellees' citation to this Court's decision in Forge v Smith, 458 Mich 198; 580 NW2d 876 (1998) as support for their argument.

Appellees cite Forge for the principle that where "one writing references another instrument, the two writings should be read together." (Appellees' Brief on Appeal, p. 27) That quotation omits critical language from the Forge decision, however. This Court actually stated that, " [w]here one writing references another instrument *for additional contract terms*, the two writings should be read together." (Emphasis supplied) Id. at 207.

Several Courts of Appeals decisions have applied Forge, stating, for example, that "Where one contract does not rely on another to furnish additional meaning, however, it does not incorporate it by reference." Breakie v Ivonyx Group Services, 2003 WL 1440098 (Mich App Dkt No. 236004, 3/20/03) See also Hesse v Ashland Oil,

2001 WL 789193 (Mich App Dkt No. 209075, 1/12/01)("[W]hile two documents may be read together to ascertain the terms of a single contract, one writing must reference the other instrument for additional contract terms.") It is not enough, then, that documents are signed on the same day. It is not even enough that the documents refer to one another. Under this Court's precedent, the documents must refer to each other in order to supply additional terms of the agreement.

That is not the situation in this case. The reference to the plat document contained within the deed restrictions appears only on the face page of the restrictions, and states as follows:

> Whereas, subdividers are the owners of Tan Lake Shores Subdivision, a subdivision located in Oxford Township, Oakland County, Michigan, *the plat of which is recorded in Liber 129 of Plats, Pages 29 & 30, Oakland County Records;*

(Emphasis supplied; Appellees' Appendix, p. 22b) This language (which Appellants' Brief fails to quote) is nothing more than a means of indentifying the land owned by the persons signing the restrictions, and a means of identifying the land to which the restrictions are to apply. This language does not, as required in Forge, refer to the plat as a source of additional terms of the agreement. Absent such a specific reference, there is no support for reading the documents as one.

Even if the documents were to be read and construed together, Paragraph 17, on which Appellees rely for their argument that Appellants' interest in Outlot A has lapsed, makes no reference whatsoever to the plat. Construing the two documents as one still does not lead to the conclusion that Paragraph 17 itself applies to the plat. And if it does, as Appellant demands it must ("the necessary and only conclusion is that the plat

and the restrictions must be construed together") what becomes of the plat? Under Paragraph 17, "all rights herein contained shall continue for a period of twenty-five years," suggesting that every ownership rights – including those of Appellees' grantors – were extinguished in 1994. In order to avoid such a result – certainly unintended by the creators and owners of Tan Lake subdivision – the Court of Appeals decision should be reversed.

UAW-GM Legal Services Plan

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Defendants-Appellants.
_____/

PROOF OF SERVICE

I, Michelle Perkins, certify that on July 9, 2003, I mailed a copy of Appellants' Reply Brief to the attorney for Appellees, Ernest R. Bazzana at 243 West Congress, Suite 800, Detroit, Michigan 48226-3260, and James Riley, Assistant Attorney General at 300 South Washington Square, Lansing, Michigan 48913, by placing the documents in the United States Mail, properly addressed, with first-class postage fully prepaid.

Michelle Perkins

Subscribed and sworn to before me this 9th of July, 2005.

LINDA S. DAWES
NOTARY PUBLIC OAKLAND CO., MI
MY COMMISSION EXPIRES May 12, 2007
ACTING IN WAYNE COUNTY, MI

Notary Public
Wayne County, Michigan

My commission expires:

Slip Copy
(Cite as: 2003 WL 1440098 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Richard A. BREAKIE,
Plaintiff/Counterdefendant-Appellee,
v.
IVONYX GROUP SERVICES, INC., a Delaware Corporation,
Defendant/Counterplaintiff-Appellant.

No. 236004.

March 20, 2003.

Before: MARKEY, P.J., and SMOLENSKI and METER, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Defendant appeals by right, challenging the trial court's orders denying its motion for summary disposition and to compel arbitration and granting plaintiff's motion for summary disposition in this breach of contract case. We affirm.

Defendant argues that the trial court erred in refusing to compel arbitration of plaintiff's claims. We disagree. The existence of an arbitration agreement and the enforceability of its terms are judicial questions that we review de novo. *Watts v. Polaczyk,* 242 Mich.App 600, 603; 619 NW2d 714 (2000). The "[i]nterpretation of unambiguous and unequivocal contracts is a question of law." *Massachusetts Indem and Life Ins Co v Thomas,* 206 Mich.App 265, 268; 520 NW2d 708 (1994).

It is undisputed that plaintiff's original complaint alleged breach of his employment agreement, which contained an arbitration clause and a choice of law provision, and breach of a promissory note, which was arguably related to the employment agreement. However, plaintiff's three specific claims (failure to pay unused paid time off (PTO), failure to reimburse travel expenses, and failure to pay the promissory note) were the same three claims that plaintiff previously submitted to the wage and hour division of the Michigan Department of Consumer and Industry Services, which the parties settled on June 4, 1999. Because the settlement terms were in writing and signed by defendant's former counsel, they were binding on defendant. See *Michigan Mut Ins Co v. Indiana Ins Co,* 247 Mich.App 480, 484-485; 637 NW2d 232 (2001); see also MCR 2.507(H). Because defendant settled the claims without demanding arbitration, we agree that the trial court properly denied defendant's motion to compel arbitration of plaintiff's original complaint. See *Madison Pub Schls v. Myers,* 247 Mich.App 583, 588-589; 637 NW2d 526 (2001). Furthermore, while the settlement agreement barred plaintiff's original complaint alleging breach of his employment agreement and the related promissory note, plaintiff amended his complaint to assert a breach of the settlement agreement instead.

"An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Walbridge Aldinger Co v. Walcon Co,* 207 Mich.App 566, 571; 525 NW2d 489 (1994). "Where one writing references another instrument for additional contract terms, the two writings should be read together." *Forge v. Smith,* 458 Mich. 198, 207; 580 NW2d 876 (1998). Where one contract does not rely on another to furnish additional meaning, however, it does not incorporate it by reference. See *id.* at 207-208. In this case, the settlement agreement fails to incorporate the terms of the parties' employment agreement.

Parties cannot be required to arbitrate when they have not agreed to do so. See *Volt Info Sciences, Inc v Board of Trustees of Leland Stanford Jr Univ,* 489 U.S. 468, 478; 109 S Ct 1248; 103 L.Ed.2d 488 (1989); see also *Hetrick v. Friedman,* 237 Mich.App 264, 267; 602 NW2d 603 (1999). Further, where the parties enter into a settlement agreement that does not contain an arbitration clause, the question of whether an agreement to arbitrate exists is for the court. See *Riley Mfg Co, Inc v Anchor Glass Container Corp,* 157 F3d 775, 780-781 (CA 10, 1998). Although the original agreement in *Riley* provided that disputes arising from or relating to it were to be resolved by

arbitration, the court found that the parties had not agreed to arbitrate disputes relating to the specific topics listed in the settlement agreement. *Id.* at 780, 782; see also *Knight v. Docu-Fax, Inc,* 838 F Supp 1579, 1583- 1584 (ND Ga, 1993). In other words, where "the presence and extent of injury under the [s]ettlement [a]greement can be determined without reference to" the parties' original agreement, the dispute does not arise from or relate to the original contract. [FN1] *Knight, supra* at 1584; see also *Collins v. Int'l Dairy Queen,* 169 FRD 690, 694 n 1 (MD Ga, 1997). Thus, the trial court in this case properly decided that any claims arising from the settlement agreement would not be subject to arbitration.

> FN1. In *Knight,* the arbitration clause did not contain language covering disputes "relating to" the original agreement. *Knight, supra,* 838 F Supp at 1583-1584. However, the distinction between "arises from" and "relates to" has been disavowed by the Eleventh Circuit. See *Gregory v. Electro-Mechanical Corp,* 83 F3d 382, 386 (CA 11, 1996). Further, the distinction is not relevant where a dispute involving the alleged breach of a settlement agreement can be resolved without reference to the original agreement. *Collins v. Int'l Dairy Queen,* 169 FRD 690, 694, n 1 (MD Ga, 1997).

***2** The result is the same even when examining the issue from the standpoint of the parties' original agreement. Under Delaware law, "[a] party cannot be forced to arbitrate the merits of a dispute ... in the absence of a clear expression of such intent in a valid agreement." *DMS Properties-First, Inc v. PW Scott Assocs, Inc,* 748 A.2d 389, 391 (Del, 2000). In a case where the arbitration clause in the parties' original agreement covered "all claims or controversies ... concerning or arising from ... the construction, performance or breach of this *or any other agreement between us,*" it was found to be broad enough to cover disputes arising from the parties' settlement agreement even though it did not contain an arbitration clause. See *Cohen v. Smith Barney Inc,* 1997 WL 1737115 (1997, Del Common Pleas), slip op at 2-3 (emphasis in original). We conclude that, even in light of Delaware law, the trial court properly refused to order plaintiff to submit his claims to arbitration.

Defendant next argues that the trial court erred in granting plaintiff's motion for summary disposition. We again disagree. A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v. Keating,* 205 Mich.App 560, 562; 517 NW2d 830 (1994). When reviewing a motion for summary disposition under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v. Cross & Peters Co,* 451 Mich. 358, 362; 547 NW2d 314 (1996).

"Absent a showing of factors such as fraud or duress, courts act properly when they enforce [settlement] agreements." *Massachusetts Indem and Life Ins Co, supra* at 268. Here, defendant does not allege fraud or duress or any other grounds for abrogating the agreement. As indicated above, settlement agreements are "governed by the legal principles applicable to the construction and interpretation of contracts." *Walbridge, supra* at 571.

"The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Michaels v. Amway Corp,* 206 Mich.App 644, 650; 522 NW2d 703 (1994), quoting *Flamm v. Scherer,* 40 Mich.App 1, 8-9; 198 NW2d 702 (1972). "However, that rule only applies when the initial breach is substantial." *Michaels, supra.* Where there is a question of fact concerning whether a party committed a material breach, summary disposition is inappropriate. *Id.* at 651.

The parties' settlement agreement provides that in exchange for defendant's promise to pay the disputed claims, plaintiff agreed to withdraw his wage and hour claim and to first address any future disputes informally. Defendant argues that plaintiff breached the agreement by filing suit in August 1999, instead of first informally addressing its failure to pay. However, it is undisputed that plaintiff promptly dismissed that lawsuit and then attempted to resolve his dispute with defendant informally, writing two letters requesting payment

before eventually commencing the present action in September 2000. We agree with the trial court that defendant was not deprived of the benefit of its bargain by plaintiff's first lawsuit because it was dismissed promptly and because plaintiff did not re-file his claims with the wage and hour division, which, as noted by the trial court, could have subjected defendant to steep penalties in addition to ordinary contract damages. See M.C.L. § 408.488; see also M.C.L. § 408.484, M.C.L. § 408.485 and M.C.L. § 408.486. Thus, defendant has failed to show that a question of fact existed concerning whether plaintiff's alleged first breach was material and thereby excused defendant's subsequent failure to perform.

***3** Plaintiff argues that defendant committed the first material breach by not beginning to make payments immediately after the wage and hour claims were settled. However, the settlement agreement does not state exactly when the payments would commence. Thus, there would be a question of fact concerning whether defendant breached the agreement by not beginning to pay until after plaintiff withdrew his wage and hour claim.

Nonetheless, it is undisputed that defendant stopped making PTO payments when plaintiff filed his first lawsuit and never resumed making them. We agree, therefore, that there is no question of fact that defendant's failure to make further PTO payments was a material breach. Further, it is also undisputed that defendant never paid *anything* toward either the unreimbursed travel expenses or the amount owed on the promissory note. As noted by the trial court, the agreement states that these obligations "will be paid as other like liabilities of [defendant], but in any case as soon as funds are available to pay these balances." Defendant alleges that it never paid other like liabilities, but does not allege that there were no funds available at any time after August 1999. Thus, we agree with the trial court that defendant failed to show a question of fact concerning whether its failure to pay was a material breach. Accordingly, the trial court properly granted plaintiff's motion for summary disposition.

We affirm.

2003 WL 1440098 (Mich.App.)

END OF DOCUMENT

Not Reported in N.W.2d
(Cite as: 2001 WL 789193 (Mich.App.))

Court of Appeals of Michigan.

Kenneth D. HESSE, Personal Representative of the Estate of Jason L. Hesse,
deceased, Kenneth D. Hesse, Cynthia R. Hesse, and Amy R. Hesse, a minor, by her
next friend, Kenneth D. Hesse, Plaintiffs-Appellees,
v.
ASHLAND OIL INC., a/k/a Ashland Inc., d/b/a Valvoline Instant Oil Change and
Valvoline Co., Defendant-Appellant,
and
CHIPPEWA VALLEY SCHOOLS, James, J. Rivard, J. Murphy, and Ruth Ann Booms,
Defendants.

No. 209075.

Jan. 12, 2001.

Before: OWENS, P.J., and JANSEN and R.B. BURNS [FN*], JJ.

FN* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

***1** Defendant-appellant Ashland Oil, Inc. (Ashland), appeals by leave granted from the trial court's order denying its motion for summary disposition of plaintiffs' claims for intentional tort, breach of contract, and negligent infliction of emotional distress. Ashland also challenges the trial court's order allowing plaintiffs to file a second amended complaint. We affirm in part, reverse in part and remand for further proceedings.

On March 3, 1995, Jason Hesse, the deceased, James P. Murphy, [FN1] and Steven Schneider [FN2] signed a document entitled "Chippewa Valley High School Work Study Plan." The plan provided that Ashland would hire sixteen- year-old Jason to perform "basic automotive service" and "basic cleaning services" at Ashland's automotive service center located in Clinton Township. Also on March 3, 1995, Schneider completed a standard "CA-7 Work Permit and Age Certificate" concerning Jason's employment with defendant. The work permit provided that Jason was to work a total of 23 hours per week, at an hourly wage of $5, and also provided that Jason would not work past 7:00 p.m. Additionally, the work permit provided that Ashland "must provide competent adult supervision at all times" and provided that Jason's employment "will conform to all federal, state, and local laws and regulations." Schneider, Jason, and his mother, Cynthia Hesse, signed the work permit. On March 6, 1995, defendant Ruth Ann Booms, acting as Chippewa Valley Schools' agent, signed and issued the work permit.

FN1. Defendant Murphy was Jason Hesse's school counselor.

FN2. Steven Schneider was the store manager of defendant Ashland Oil's "Valvoline Instant Oil Change" automobile service center in Clinton Township.

In 1995, Ashland accepted used oil products from the general public at its automobile service centers. When customers dropped off used motor oil, they would identify the substance on a pre-printed form, record the amount they were leaving at the service center, provide their address and sign their name. The used motor oil was poured into a 1,000-gallon storage tank located in the basement of the service center.

On June 2, 1995, seventeen-year-old Bradley Dryer was working at Ashland's Valvoline service center along with Jason and others. Schneider had left Dryer in charge of the business while he was away from the service center. That day, Dryer accepted approximately five gallons of a black liquid in a paint bucket from an unknown man. As Dryer explained, when Ashland's employees accepted waste products from people, they "would look at them a little bit," but generally would not smell

them unless they noticed "a certain smell." Dryer did not notice anything unusual about the black liquid, although he did not smell it and did not check its viscosity; he assumed it was used motor oil. However, when he poured the liquid into the storage tank, he noticed that there had been a paintbrush and some industrial plastic wrap in the paint can, along with the black liquid. A fire investigator concluded later that the substance Dryer accepted from the unknown person actually was gasoline, not motor oil.

At closing on June 2, 1995, it was Dryer's responsibility to check the level of the storage tank located in the basement. Dryer opened the top of the tank to look inside and determine its level. However, according to the fire investigator, he used the flame from his Bic lighter in order to see inside the storage tank. This caused an explosion and fire, which killed Jason, who had been standing nearby when Dryer checked the storage tank.

I

***2** Defendant first argues that the trial court erred in denying its motion for summary disposition of plaintiffs' intentional tort claim under MCR 2.116C)(10). We agree.

Summary disposition of all or part of a claim or defense may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2 .116(C)(10). When deciding a motion under (C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the moving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Ritchie-Gamester v. Berkley,* 461 Mich. 73, 76; 597 NW2d 517 (1999). On appeal, the trial court's decision is reviewed de novo. *Id.* The question whether the facts alleged are sufficient to constitute an intentional tort within the meaning of the intentional tort exception of the Worker's Disability Compensation Act, M.C.L. § 418.131(1); MSA 17.237(131)(1), is a question of law for the court. *Graham v. Ford,* 237 Mich.App 670, 674; 604 NW2d 713 (1999). Questions of law are reviewed de novo. *Hagerman v. Gencorp Automotive,* 457 Mich. 720, 727; 579 NW2d 347 (1998).

The purpose of the Worker's Disability Compensation Act ("WDCA"), M.C.L. § 418.101 *et seq.;* MSA 17.237(101) *et seq.,* is to compensate an employee for loss of wage-earning capacity due to a work-related injury. *Eaton v. Chrysler Corp (On Remand),* 203 Mich.App 477, 486; 513 NW2d 156 (1994). Generally, disability benefits provided under the act are the sole remedy for work-related injuries. M.C.L. § 418.131(1); MSA 17.237(131)(1); *Palazzola v. Karmazin Products Corp,* 223 Mich.App 141, 147; 565 NW2d 868 (1997). However, pursuant to M.C.L. § 418.131(1); MSA 17.237(131)(1),

> [t]he only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court.

For purposes of the intentional tort exception of the WDCA, a "deliberate act" includes both acts and omissions and encompasses situations in which the employer "consciously fails to act." *Travis v. Dreis & Krump Mfg Co,* 453 Mich. 149, 169-170; 551 NW2d 132 (1996) (Boyle, J.); *Palazzola, supra* at 149. The phrase "specifically intended an injury" means that an employer must have had a conscious purpose to bring about specific consequences. When the employer is a corporation, a particular employee must possess the requisite state of mind in order to prove an intentional tort. *Travis, supra* at 171- 172; *Palazzola, supra* at 149. Thus, to state a claim against an employer for an intentional tort, a plaintiff must show that the employer deliberately acted or failed to act with the purpose of inflicting an injury upon the employee. *Travis, supra* at 172.

***3** Where there is no direct evidence of intent to injure, intent may be inferred where a plaintiff can show that "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MCL 418.131(1); MSA 17.237(131)(1). "Actual knowledge" means that constructive, implied or imputed knowledge is not enough; nor is it sufficient to show that the employer should have known, or had reason to believe, injury was certain to occur. *Travis, supra* at

173; *Palazzola, supra* at 149. A plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do. *Travis, supra* at 173-174; *Palazzola, supra* at 149. To show that "an injury was certain to occur," a plaintiff cannot rely on the laws of probability, the mere prior occurrence of a similar event, or conclusory statements of experts. Further, an employer's awareness that a dangerous condition exists is simply not enough; a plaintiff must show that the employer was aware injury was certain to result from what the actor did. *Travis, supra* at 174-178; *Palazzola, supra* at 149-150. To show that the employer "willfully disregarded" actual knowledge that an injury was certain to occur, a plaintiff must prove that the employer's act or failure to act was more than mere negligence, e.g., failing to protect someone from a foreseeable harm. *Travis, supra* at 178-179; *Palazzola, supra* at 150.

Applying these principles to the facts of this case, we agree with Ashland's contention that the trial court erred in denying its motion for summary disposition of plaintiffs' intentional tort claim. There being absolutely no direct evidence that defendant or its managerial employees specifically intended to injure Jason Hesse, the question is whether the evidence, viewed in a light most favorable to plaintiffs, showed that Ashland or its managerial employees, specifically Bradley Dryer, [FN3] disregarded actual knowledge that an accident was certain to occur. The evidence does not show this.

> FN3. It is not clear that Dryer, by being left "temporarily in charge" at the service center, can be considered a "managerial employee." However, because we view the evidence in a light most favorable to the nonmoving party, *Ritchie-Gamester, supra* at 76, for the purposes of this decision--and without attempting to critically analyze the issue--we accept the view that Dryer was a managerial employee for Ashland.

First, plaintiffs contend that Ashland's hiring and training policies insured that the accident in question was certain to occur. However, the evidence does not support this conclusion. Ashland hired and trained minors and other employees to accept used motor oil and antifreeze from the public at large so that these substances could be recycled. Defendant trained employees to identify used motor oil by sight and smell. Pursuant to their training, employees were instructed to refuse substances purported to be used motor oil if they appeared to be too thin or too thick, or if they had odors that would indicate they were something other than used motor oil. Moreover, customers who returned used oil products to defendant's oil change centers were required to complete a pre-printed form to identify themselves and the substances they were returning. Thereafter, the used motor oil was stored in a 1,000-gallon storage tank located in the basement of the service center. Although it is clear from the evidence that Ashland's procedures created a risk that its employees, whether minors or adults, might accidentally accept combustible petroleum products or other volatile substances from members of the public at large and place them in the storage tank, it is just as clear that Ashland took precautions to prevent this from happening by training its employees to ascertain the identity of used automobile waste products. Evidence that Ashland was aware of the potential for danger is insufficient to show actual knowledge of certainty of injury, especially because Ashland took precautions to guard against that risk. See *Bazinau v Mackinac Island Carriage Tours*, 233 Mich.App 743, 755-756; 593 NW2d 219 (1999). Plaintiffs have failed to submit further evidence to show that Ashland's hiring of minors, standing alone, and its failures to properly limit their hours of employment and provide them with constant adult supervision made it certain that an accident would occur. [FN4]

> FN4. Plaintiffs also allude to the fact that defendant committed several violations of state safety regulations in regard to the employment of minors. Violations of legislative safety standards are not sufficient to circumvent the exclusive remedy provision of the WDCA. *Smith v. Mirror Lite Co*, 196 Mich.App 190, 193-194; 492 NW2d 744 (1992). Plaintiffs do not further establish that defendant's alleged violations made it certain that Jason Hesse's injury would occur.

***4** Second, although the evidence established that Ashland required its employees to periodically check the level of the petroleum products stored in the underground storage tank, there is nothing to suggest that this insured the occurrence of injury. Evidence showed that employees were expected to check the level of used oil in the storage tank by inserting a measuring stick into the tank. The evidence does not show this procedure to be unduly risky or certain to result in injury. Although Bradley Dryer denied there was a measuring stick available for checking the level of the storage tank, he acknowledged there was a flashlight available to look into the tank, but he either could not find it or its batteries were dead. There is absolutely no evidence to establish that Ashland or its managerial employees required employees to check the tank in an unduly dangerous manner, like using an open flame to check the tank. Although a state fire investigator concluded that Dryer did just that, thus causing the explosion, he based this conclusion on Dryer's out-of-court, hearsay statements that he used the flame from a Bic lighter to check the level of the tank's contents. The existence of a disputed fact must be established by admissible evidence. *Maiden v. Rozwood,* 461 Mich. 109, 123; 597 NW2d 817 (1999). Apart from Dryer's hearsay statements, there is no other evidence that witnesses saw him use an open flame to check the contents of the oil tank. The trial court should not have considered the investigator's inadmissible testimony in determining the existence of triable issues.

Third, the evidence does not show that Bradley Dryer had actual knowledge that, due to his actions, an injury was certain to occur, and that he willfully disregarded this knowledge. In his deposition, Dryer testified that, on the day of the accident, he accepted five gallons of a black liquid in a paint bucket from an unknown man. Dryer testified that he did not notice anything unusual about the black liquid, although he did not smell it and did not check its viscosity; he assumed it was used motor oil and poured it into the storage tank. However, when he poured the liquid, he noticed there had been a paintbrush and some industrial plastic wrap on the paint can, along with the black liquid. Although this evidence certainly is sufficient to establish Dryer's negligence, it is not sufficient to show that he had actual knowledge an injury was certain to occur, and yet disregarded this knowledge. As stated, Dryer assumed the liquid was used motor oil. He did not believe it was anything else. Plainly, the evidence does not show that Dryer believed injury was *certain* to occur based on his acceptance of the unknown liquid and its placement in the storage tank.

Even if plaintiffs could establish that Dryer checked the level of the oil storage tank by using the open flame from his lighter, the evidence, viewed in a light most favorable to plaintiffs, still establishes only that Dryer was negligent. In his deposition, Dryer testified that he was unaware of "the flash point of petroleum products." Although he was familiar with the combustibility of gasoline products, Dryer's testimony does not support the conclusion that he was aware the waste oil storage tank contained any combustible substances at all. Therefore, even if he took the extremely risky step of using an open flame to check the level of oil in the storage tank, there is no indication from the evidence that he was *certain* this act would lead to the explosion that killed Jason Hesse, or that he intended such an event to occur.

***5** Moreover, Dryer was positioned on top of the storage tank when the explosion occurred and was injured in the accident. In *Palazzola, supra* at 145-146, the leader of an industrial maintenance crew ordered two employees into a storage tank containing toxic gases, where they were overcome by the fumes. The crew leader entered the tank to save one of the employees, but he too was overcome. *Id.* at 146. In analyzing whether the crew leader had actual knowledge of certain injury, this Court stated:

> [E]ven if [the crew leader]'s knowledge and actions could be imputed to his employer, plaintiff has not established that [the crew leader] had actual knowledge of certain injury. Assuming as true plaintiff's allegation that [the crew leader] generally knew about the dangers of [the toxic substance] and knew of its presence in the holding tank's water, those two facts do not establish knowledge of injury certain to occur. In his deposition, [the crew leader] testified that he did not appreciate the danger of [the toxic gas] in the holding tank. Further, his testimony is buttressed by evidence that he willingly entered the holding tank in an attempt to retrieve [the injured worker.] [*Id.* at 154 (footnote omitted) .]

Here, Dryer's own dangerous position in the accident further supports Ashland's argument that he (and therefore, by imputation, Ashland) did not have actual knowledge of certain injury.

We conclude that, viewing the evidence in a light most favorable to them, plaintiffs failed to establish that Ashland or any of its managerial employees had actual knowledge that Jason Hesse's injuries were certain to occur, yet willfully disregarded this knowledge. Therefore, the trial court erred in denying Ashland's motion for summary disposition. Plaintiffs' intentional tort claim is barred by M.C.L. § 418.131(1); MSA 17.237(131)(1).

II

Next, Ashland argues that the trial court erred by refusing to grant its motion for summary disposition of plaintiffs' breach of contract claim. We agree.

As a preliminary matter, defendant argues that the exclusive remedy provision of the WDCA bars plaintiffs' breach of contract claim. See M.C.L. § 418.131(1); MSA 17.237(131)(1). Generally, a claim that an employer breached a contractual promise to provide safe working conditions merely amounts to a claim of negligence, which is barred by the exclusive remedy provision. *Schefsky v. Evening News Ass'n,* 169 Mich.App 223, 229-230; 425 NW2d 768 (1988). However, a claim based on the breach of an express contract to provide safe working conditions may survive a challenge based on the exclusive remedy provision. *Id.* at 230-231. Because plaintiffs' contract claim is premised on defendant's breach of an alleged express contract to provide safe working conditions to Jason, this claim is not barred.

The first problem with plaintiffs' breach of contract claim against Ashland arises from the physical aspects of the alleged contract, which is comprised of two separate documents, one entitled a "Work Study Plan" and the other a "Work Permit." The parties' arguments are premised on the assumption that this Court must read these documents together in order to determine whether plaintiffs have established the existence of a valid contract. However, while two documents may be read together to ascertain the terms of a single contract, one writing must reference the other instrument for additional contract terms. *Forge v. Smith,* 458 Mich. 198, 207; 580 NW2d 876 (1998). Here, the Work Study Plan and the Work Permit are two separate documents, neither of which contains terms referencing the other for the purpose of supplying contractual terms. Therefore, in the absence of any indication whatsoever that the parties intended them to be read together to form a complete contract, we must examine each separately.

***6** The elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Detroit Trust Co v. Struggles,* 289 Mich. 595, 599; 286 NW 844 (1939). "The essence of consideration ... is [a] legal detriment that has been bargained for and exchanged for [a] promise. *Higgins v. Monroe Evening News,* 404 Mich. 1, 20; 272 NW2d 537 (1978) (Moody, J). The parties to a contract must have *agreed and intended* that the benefits each derived be the consideration for a contract. *Id.* at 20-21 (Moody, J). As this Court observed in *Kamalnath v. Mercy Memorial Hosp Corp,* 194 Mich.App 543, 548; 487 NW2d 499 (1992), "a valid contract requires a 'meeting of the minds' on all the essential terms." Quoting from its opinion in *Stanton v. Dachille,* 186 Mich.App 247, 256; 463 NW2d 479 (1990), this Court stated:

> In order to form a valid contract, there must be a meeting of the minds on all material facts. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. [citing *Heritage Broadcasting Co v. Wilson Communications, Inc,* 170 Mich.App 812, 818; 428 NW2d 784 (1988).]

This Court construes contractual language according to its plain and ordinary meaning, avoiding technical or constrained constructions. *St Paul Fire & Marine Ins Co v. Ingall,* 228 Mich.App 101, 107; 577 NW2d 188 (1988). The construction of unambiguous contractual language is a question of law that this Court reviews de novo. *Id.*

Turning first to the Work Study Plan, plaintiffs contend that, with this document, they agreed to allow Jason to work for Ashland outside the scope of the Youth Employment Standards Act (YESA), M.C.L. § 409.101 *et seq.;* MSA 17.731 *et seq.,* in exchange for Ashland's agreement to "conform to all federal, state and local laws and regulations." Plaintiffs premise their argument on their contention that Jason would not have been allowed to work at Ashland's oil change center without the Work Study Plan "contract" because his employment at the oil change center was hazardous, and the YESA prohibits minors from engaging in hazardous occupations. See M.C.L. § 409.103; MSA 17.731(3). Plaintiffs contend that the Work Study

Plan constituted a contract between "the employer and the governing body of the school district ... at which the minor is enrolled" to exempt Jason's employment from the strictures of the YESA, as contemplated by M.C.L. § 409.118; MSA 17.731(18).

However, there is absolutely no evidentiary support for plaintiffs' position that, by signing the Work Study Plan, Ashland intended to exempt Jason from the YESA and provide for his occupational safety outside the Act. First, contractual language is read according to its plain meaning. *St Paul Fire & Marine Ins, supra.* There is absolutely no language in the Work Study Plan that would lead to plaintiffs' interpretation of the document. The Work Study Plan purports to be just that, i.e., a scholastic plan for Jason's participation in his school's work-study program, not a contract of exemption pursuant to M.C.L. § 409.118; MSA 17.731(18). In essence, plaintiffs ask this Court to view the Work Study Plan as a valid, enforceable contract, yet one that is not governed by its clear terms. We cannot accept such an invitation.

***7** Second, other evidence belies plaintiffs' contention that the Work Study Plan was intended by the parties as a contract to exempt Jason's employment from the YESA. The fact that Jason was issued a Work Permit indicates, contrary to plaintiffs' position, that the YESA governed his employment at Ashland's oil change center. MCL 409 .104(1); MSA 17.731(4)(1) states, in pertinent part, "a minor shall not be employed in an occupation regulated by this act until the person proposing to employ the minor procures from the minor and keeps on file at the place of employment a copy of the work permit or a temporary permit." However, a contract between an employer and a school board pursuant to M.C.L. § 409.118; MSA 17.731(18) completely exempts the employment of a minor from the YESA. This kind of contract would necessarily divest the employer of the responsibility of obtaining a work permit to employ the exempted minor under the YESA. The fact that the parties sought and obtained a work permit for Jason further indicates that the Work Study Plan was not the kind of contract of exemption contemplated by M.C.L. § 409.118; MSA 17.731(18).

Accordingly, we find a complete absence of a bargained-for exchange between the parties. While plaintiffs argue that Jason's parents allowed him to be employed without the protections of the YESA, in exchange for Ashland's agreement to guarantee Jason's safety, plaintiffs have utterly failed to provide evidentiary support for their position that this was the mutual intent and agreed-upon exchange of the parties when they executed the Work Study Plan. Without supporting evidence, plaintiffs have attempted to show the existence of a valid contract merely on the basis of their own, subjective view of the Work Study Plan, which is insufficient. *Marlo Beauty Supply, Inc v. Farmers Ins Group,* 227 Mich.App 309, 317; 575 NW2d 324 (1998).

Next, plaintiffs contend that the Work Permit constituted a valid contract between the parties. However, this document is fraught with the same deficiencies as the Work Study Plan. As discussed, Ashland was obligated under M.C.L. § 409.104(1); MSA 17.731(4)(1) to obtain a permit before it could employ Jason. There is absolutely no indication on the face of this document or elsewhere in the evidence that Ashland intended the Work Permit to be a contract exempting Jason from the YESA in exchange for Ashland's agreement to ensure Jason's safety in the workplace. Plaintiffs seek to convince this Court by resorting to their own, subjective understanding of the document as a legally enforceable contract. However, plaintiffs' subjective view of the Work Permit is irrelevant. *Marlo Beauty Supply, Inc, supra.* Indeed, the Work Permit is a statutorily required document that is required to be filed before a minor can obtain employment; this statutory purpose is inconsistent with plaintiffs' view of the document as a contract between Ashland and Jason's parents.

In sum, plaintiffs have failed to show an agreed-upon, bargained-for exchange--"the essence of legal consideration"--in relation to the Work Permit or the Work-Study Plan. *Higgins, supra.* Therefore, plaintiffs failed to demonstrate the existence of a valid contract between the parties. Because plaintiffs failed to establish the existence of triable facts with regard to whether the Work Study Plan and Work Permit constituted a valid contract between the parties, the trial court erred by refusing to grant summary disposition of plaintiffs' breach of contract claim.

III

***8** Next, Ashland argues the trial court erred by

refusing to grant its motion for summary disposition of plaintiffs' claims for negligent infliction of emotional distress. We disagree.

Michigan recognizes a cause of action in negligence for a parent who witnesses the negligent infliction of injury to his or her child and suffers emotional distress as a consequence. *Wargelin v Sisters of Mercy Health Corp*, 149 Mich.App 75, 80; 385 NW2d 732 (1986). The elements of this tort are as follows: "(1) the injury threatened or inflicted on the child must be a serious one, of a nature to cause severe mental disturbance to the plaintiff; (2) the shock must result in actual physical harm; (3) the plaintiff must be a member of the immediate family, or at least a parent, child, husband or wife; and (4) the plaintiff must actually be present at the time of the accident or at least suffer shock 'fairly contemporaneous' with the accident." *Id.* at 81. "[T]he bystander need not actually witness the accident as long as the injury to the individual plaintiffs occurs fairly contemporaneous with the accident. These limitations insure against deceptive claims and restrict the cause of action to bystanders whom the tortfeasor could reasonably have foreseen might have suffered mental disturbance as a result of witnessing the accident." *Id.*

As a preliminary matter, Ashland argues that the exclusive remedy provision of the WDCA bars plaintiffs' negligent infliction of emotional distress claim. See M.C.L. § 418.131(1); MSA 17.237(131)(1). Generally, however, claims for negligent infliction of emotional distress brought by independent plaintiffs, even when they concern a work-related accident, constitute separate torts that are not dependent upon actual injury to, or recovery by, the injured worker. See *Auto Club Ins Ass'n v. Hardiman*, 228 Mich.App 470, 474-477; 579 NW2d 115 (1998) and *Barnes v. Double Seal Glass Co, Inc*, 129 Mich.App 66, 75-76; 341 NW2d 812 (1983). Thus, the exclusive remedy provision does not bar plaintiffs' claims for negligent infliction of emotional distress.

Ashland next argues that plaintiffs produced no evidence that Kenneth and Cynthia Hesse suffered actual physical harm as a result of the accident, other than the expected shock and distress stemming from the death of their son. We disagree. Evidence showed that Cynthia Hesse became so hysterical when she arrived at the scene of the fire that she required immediate medical treatment and sedation. Further, in her deposition, Cynthia Hesse testified that she experienced additional medical problems as a result of her trauma. Mrs. Hesse testified that her preexisting bladder condition was exacerbated by her nervous condition after Jason's death. Moreover, she suffered at least one nightmare related to Jason's death, during which she reacted so violently that she pulled muscles in her neck and shoulder, which required medical attention. Clearly, plaintiffs established a triable issue with regard to whether Cynthia Hesse incurred actual physical injury due to the shock she experienced because of her son's death. See *Daley v. LaCroix*, 384 Mich. 4, 15-16; 179 NW2d 390 (1970); *Toms v. McConnell*, 45 Mich.App 647, 656-657; 207 NW2d 140 (1973).

***9** Further, plaintiffs succeeded in establishing a triable issue with regard to whether Kenneth Hesse suffered an actual physical injury. According to the evidence, Kenneth Hesse experienced shock and trauma related to Jason's death. Mr. Hesse reported experiencing "depression, anxiety[,] sleeping problems" and an inability to concentrate. He also stated that Jason's death had caused him to abuse alcohol. In August 1996, a doctor prescribed Mr. Hesse Prozac because he was having "[a] lot of trouble with energy," which was related to Mr. Hesse's state of grief following Jason's death. This evidence establishes a triable issue with regard to whether Mr. Hesse suffered actual physical injury as a result of the accident.

Ashland also argues that plaintiffs failed to submit evidence to show that the Hesses suffered shock "fairly contemporaneous" to the accident. We disagree. According to the evidence, the Hesses were notified of the explosion and arrived at the scene shortly after it occurred, while the fire still raged at the service center, which was located approximately one half mile from their house. They were present for the entire unsuccessful rescue operation. While the fire was still burning, a police officer approached Kenneth Hesse and told him that Jason was dead. Therefore, the evidence establishes a triable issue whether the Hesses suffered shock "fairly contemporaneous" to the accident that resulted in Jason's death. *Gustafson v. Faris*, 67 Mich.App 363, 369-370; 241 NW2d 208 (1976). Accordingly, the trial court did not err in refusing to summarily dismiss plaintiffs' claims for negligent infliction of emotional distress.

IV

Finally, Ashland takes issue with several of the trial court's rulings, including its failure to timely rule on one of their motions for summary disposition, its decision to allow consolidation of the plaintiffs' claims against it brought in two separate lawsuits, and its decision to allow plaintiffs to file a second amended complaint. We have examined Ashland's arguments as to these issues and have determined that its true argument concerns the trial court's discretionary decision to allow plaintiffs to file a second amended complaint, thus adding their claim of negligent infliction of emotional distress. However, Ashland has not attempted to address the merits of the trial court's decision to grant plaintiffs' motion to amend. Failure to argue an issue results in its abandonment on appeal. *Dresden v. Detroit Macomb Hosp Corp*, 218 Mich.App 292, 300; 553 NW2d 387 (1996). Accordingly, we decline to address this issue further.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

2001 WL 789193 (Mich.App.)

END OF DOCUMENT

2003 WL 271317
--- N.W.2d ---
(Cite as: 2003 WL 271317 (Mich.App.))

Court of Appeals of Michigan.

Thomas J. HALL, Plaintiff-Appellee,
and
Sharon A. Hall, Gloria Rogers Zerbes, Terry L. Sancartier, Pearl Tucker, Robert Whall, Jr., James Whall, James W. Elliott, Judith Elliott, Thomas Hall, Shirley A. Hall, Val Jones, Ken Jones, Nancy Kirby, Anthony Thomson, James E. Harland, Bridget Harland, Mark Millikin, Peter Kocefas, Donald Carl, Donna Carl, Theodore D. Schmidt, Rosemary Schmidt, Marshall Damoth, Gladys Damoth, Ralph Allman, Irene Allman, Shawn M. Krayes, Eddie Coe, Larry Pratt, Barb Hanss Koerner, Douglas E. Hinkle, Gordon Moore, Susan Moore, Jane Trenary, Darrel Metzer, Annette Metzer, Kathleen Prause, Leane Tingstad, Kevin Tingstad, James C. Drudge, Belinda Drudge, Terri Goddard, Alan Scott Hubbard, Richard Peffley, Sherri Peffley, Daniel A. Peterson, Gerald K. Hall, James A. Hatfield, Nancy L. Hatfield, Jeffery A. Prause, Pam Prause, Dale E. Rohde, Marie Rohde, Jean A. Reed, Billy R. Reed, Kevin Sloam, Tammy Trullard, Robert Whall, Ann Whall, Richard A. Benfield, Virginia Benfield, Kathryn Henry, Henry Ford, Monte Ream, Susan Ream, Larry Leclair, Geraldine Leclair, Michael Young, Jennie Pratt, Joane Krayes, Doria McClain, James A. Wash, Rebecca Wash, Steven Kirby, Deanna Kirby, Craig Delvin, and Shelly Hubbard, Plaintiffs/Counterdefendants-Appellees,
v.
David B. HANSON, Sherry M. Hanson, Jeffrey J. Jerome, and Lauri O. Jerome, Defendants/Counterplaintiffs-Appellees,
and
Department of Commerce, Defendant/Counterdefendant-Appellant,
and
Department of Natural Resources, Third-Party Defendant/ Counterdefendant-Appellant,
and
Township of Grayling, Intervening Defendant/ Counterdefendant-Appellee.
Thomas J. Hall, Sharon A. Hall, Gloria Rogers Zerbes, Terry L. Sancartier, Pearl Tucker, Robert Whall, James Whall, James W. Elliott, Judith Elliott, Thomas Hall, Shirley A. Hall, Val Jones, Ken Jones, Nancy Kirby, Anthony Thomson, James E. Harland, Bridget Harland, Mark Millikin, Peter Kocefas, Donald Carl, Donna Carl, Theodore D. Schmidt, Rosemary Schmidt, Marshall Damoth, Gladys Damoth, Ralph Allman, Irene Allman, Shawn M. Krayc, Eddie Coe, Larry Pratt, Barb Hanss Koerner, Douglas E. Hinkle, Gordon Moore, Susan Moore, Jane Trenary, Darrel Metzer, Annette Metzer, Kathleen Prause, Leane Tingstad, Kevin Tingstad, James C. Drudge, Belinda Drudge, Terri Goddard, Alan Scott Hubbard, Shelly Hubbard, Richard Peffley, Sherri Peffley, Daniel A. Peterson, Gerald K. Hall, James A. Hatfield, Nancy L. Hatfield, Jeffery A. Prause, Pam Prause, Dale E. Rohde, Marie Rohde, Jean A. Reed, Billy R. Reed, Kevin Sloan, Tammy Trullard, Robert Whall, Ann Whall, Richard A. Benfield, Virginia Benfield, Kathryn Henry, Ford Henry, Monte Ream, Susan Ream, Larry Leclair, Geraldine Leclair, Michael Young, Jennie Pratt, Joane Krayes, Doria McLain, James A. Wash, Rebecca Wash, Steven Kirby, Deanna Kirby, and Craig Devlin, Plaintiffs/Counterdefendants-Appellees,
v.
David B. Hanson, Sherry M. Hanson, Jeffrey J. Jerome, and Lauri O. Jerome, Defendants/Counterplaintiffs-Appellants/Cross-Appellees,
and
County of Crawford, Defendant-Appellee,
and
Department of Natural Resources and Department of Commerce, Defendants/Counterdefendants-Appellees/Cross-Appellants,
and
Township of Grayling, Intervening Defendant/ Counterdefendant-Appellee/Cross-Appellant.

Docket Nos. 222800, 222803.

2003 WL 271317
--- N.W.2d ---
(Cite as: 2003 WL 271317 (Mich.App.))

Submitted Nov. 6, 2002, at Lansing.
Decided Feb. 7, 2003, at 9:10 a.m.

Citizens seeking to use boulevard to gain access to lake brought action against owners of property abutting boulevard, alleging that owners interfered with public use of and wrongly claimed title to boulevard, which had been dedicated and accepted as public street or alley by township, and various state agencies were joined as defendants. Owners filed counter-complaint seeking, among other things, to quiet title. Following bench trial, the Crawford Circuit Court, concluded this was proper action to quiet title and divided boulevard, with portions vesting in township and in owners. Township and state agencies appealed. The Court of Appeals held that: (1) when a party seeks to vacate or otherwise alter plats dedicating real property to the public, party should bring action pursuant to the Land Division Act (LDA), and (2) trial court's erroneous consideration of owners' counter-complaint as equitable action to quiet title to land, rather than action under LDA, did not preclude court from granting relief to landowners under LDA pursuant to its current findings of fact without new proceedings.

Reversed and remanded.

[1] Appeal and Error ⇦893(1)

30k893(1) Most Cited Cases

Whether trial court erred by trying case as a quiet title action rather than as an action to vacate a road under the Land Division Act (LDA) was a question of law that Court of Appeals would review de novo. M.C.L.A. § 560.101 et seq.

[2] Dedication ⇦38
119k38 Most Cited Cases

When a party seeks to vacate or otherwise alter plats dedicating real property to the public, party should bring action pursuant to the Land Division Act (LDA) rather than bringing an action to quiet title. M.C.L.A. § 560.101 et seq

[2] Quieting Title ⇦3
318k3 Most Cited Cases

When a party seeks to vacate or otherwise alter plats dedicating real property to the public, party should bring action pursuant to the Land Division Act (LDA) rather than bringing an action to quiet title. M.C.L.A. § 560.101 et seq

[3] Quieting Title ⇦49
318k49 Most Cited Cases

Trial court's erroneous consideration of claim brought by owners of land adjacent to boulevard to vacate or otherwise alter plats dedicating boulevard to public as equitable action to quiet title to land, rather than action under Land Division Act (LDA), did not preclude court from granting relief to landowners under LDA pursuant to its current findings of fact without new proceedings, since, trial was full and fair, and landowners purposefully chose not to proceed under the LDA. M.C.L.A. § 560.101 et seq.
Crawford Circuit Court; LC No. 95-003657-CH.

Carey & Jaskowski, P.L.L.C. (by William L. Carey and Kathleen Kaufman), Grayling, for David B. and Sherry M. Hanson and Jeffrey J. and Lauri O. Jerome.

Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, A. Michael Leffler and James E. Riley, Assistant Attorneys General, for Departments of Commerce and Natural Resources.

Law Offices of Monte J. Burmeister, PLLC (by Monte Burmeister), Grayling, for Grayling Township.

Before: WHITBECK, C.J., and HOOD and KELLY, JJ.

PER CURIAM.

*1 The trial court, having concluded as a matter of law that this was a proper action to quiet title, entered a judgment dividing a piece of disputed property. None of the original plaintiffs participates in this appeal. We reverse and remand.

I. Basic Facts And Procedural History

2003 WL 271317
--- N.W.2d ---
(Cite as: 2003 WL 271317 (Mich.App.))

These consolidated appeals arise from a property dispute involving a stretch of land located in Grayling Township, Crawford County. This piece of property is called "Northerly Boulevard," and at some times simply "Boulevard" or "boulevard." This land, which leads to Lake Margrethe, was marked as a "boulevard" on a 1902 plat of the Grayling Park subdivision. The 1902 plat included a statement that the "streets and alleys" on the plat were dedicated to the public's use. The land was also marked as a boulevard on a replat in 1916, which reiterated the public dedication of "streets and alleys." In 1937, the Crawford County Road Commission passed a resolution stating that it was meeting to take over streets. The resolution specified certain streets and alleys as being part of the county road system, including the boulevard under the subheading "Grayling Park." Approximately three years later, on July 5, 1940, the road commission passed a resolution expressing a desire to *vacate* certain streets, including the boulevard. On August 20, 1940, the road commission passed a resolution stating that it was amending the July 5, 1940, resolution, in part to strike the reference to the boulevard. However, while the road commission recorded the July 1940 resolution that vacated the boulevard in February 1954, it did *not* record the August 1940 resolution purporting to amend the July 1940 resolution. Further confusing the nature of the boulevard was a circuit court order entered in October 1940 vacating the plat of some of the streets in the Grayling Park subdivision, but not the boulevard at issue.

The boulevard was virtually unused until the mid-1960s, when the road commission paved a small portion of it. This paved strip extended through a wooded area toward the lake shore, but stopped short of the lake because of a steep decline toward the water. For about two years, the road commission also "punched" a hole in the snow banks to allow vehicles to turn around. Additionally, however, Grayling Township assessed taxes on a portion of the property, which it collected from David B. and Sherry M. Hanson.

In the 1990s, the numerous plaintiffs sued David Hanson, Sherry Hanson, Jeffrey Jerome, and Lauri Jerome, who own private property abutting the boulevard. Plaintiffs alleged that the Hansons and the Jeromes interfered with the public use of and wrongly claimed title to the boulevard, which was dedicated and accepted as a public street or alley. Plaintiffs wished to use the boulevard to gain access to Lake Margrethe. The Hansons and the Jeromes filed a countercomplaint seeking, among other things, to quiet title to the disputed property in themselves and to enjoin plaintiffs from doing anything other than accessing the surface of the lake for reasonable activities. [FN1] Through a variety of procedures, including joinder and intervention, the Department of Commerce, [FN2] the Department of Natural Resources, Grayling Township, and the Crawford County Road Commission became defendants in the action.

***2** Once the proceedings in this case commenced, the trial court granted the road commission's motion for summary disposition, dismissing the commission from the case. The trial court also granted the motion for summary disposition brought by the Hansons and the Jeromes regarding the use of the lake at the end of the boulevard, permanently enjoining certain activities by nonproperty owners, such as sunbathing and erecting permanent boat moorings, but allowing one public dock to be erected for public use. Additionally, the trial court dismissed the majority of individual plaintiffs from this case when they failed to comply with discovery. Though the state Departments of Commerce and Natural Resources (the state parties) argued in their own motion for summary disposition that the Hansons and the Jeromes could not proceed on a quiet title theory because the Land Division Act (LDA), M.C.L. § 560.101 *et seq.*, controlled the procedures and outcome in this case, the trial court denied the motion. In doing so, the trial court agreed with the Hansons and the Jeromes that there was a question of fact concerning whether the land had been privately owned since 1954, when the road commission recorded the resolution vacating the boulevard.

At trial, all the remaining governmental parties, including Gaylord Township, argued that the disputed boulevard was a public road because it had been dedicated to the public and the road commission had accepted that dedication. In contrast, the Hansons and the Jeromes argued that no proper governmental entity had ever accepted the land dedicated as the boulevard, much less in a timely manner, which meant that, as the adjoining property owners, the property constituting the boulevard had reverted to them. Alternatively, the

Hanson and Jerome parties contended that if the dedicated property had been accepted in a proper and timely fashion, the road commission had abandoned the property in a July 5, 1940, resolution, which was recorded on February 6, 1954. As further evidence of abandonment, they noted that, in 1979, the Hansons had recorded a deed describing part of their property as "part of the vacated boulevard," the boulevard had not been included in three road certifications following 1940, and Grayling Township had taxed the Hansons for a portion of the boulevard, as if it were private property, not a public street. [FN3]

After a bench trial, the trial court concluded that a portion of the boulevard from North Portage Avenue to Lake Margrethe, including "all the paved strip and a 5 foot to 7-1/2 foot strip on each side thereof and encompassing the level usable portion of Northerly Boulevard" would be vested in Grayling Township to be held in trust for the public. The trial court ordered that the portion of the boulevard south of that vested in Grayling Township and adjoining the Hansons' property be vested in the Hansons. Similarly, the trial court ordered that the remaining portion of the boulevard, north of that vested in Grayling Township and adjoining the Jeromes' property, would be vested in the Jeromes.

II. Basis For Action

A. Standard Of Review

***3** [1] The state [FN4] parties argue that the trial court erred by trying this matter as a quiet title action rather than as an action to vacate a road under the LDA. This is a question of law, which we review de novo. [FN5]

B. The Controversy

The Hanson and Jerome parties framed their countercomplaint, in pertinent part, as an action to quiet title under M.C.L. § 600.2932(1). This statute, which is part of the Revised Judicature Act, provides that

> [a]ny person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not . [FN6]

The Revised Judicature Act explicitly makes actions to quiet title "equitable in nature." [FN7] Although not using this term of art, the Hansons and the Jeromes contended that the 1902 and 1916 plats of the boulevard were clouds on their title to this property. A "cloud on title" is

> [a]n outstanding claim or encumbrance which, if valid, would affect or impair the title of the owner of a particular estate, and on its face has that effect, but can be shown by extrinsic proof to be invalid or inapplicable to the estate in question. [FN8]

Historically, an action to quiet title has been an appropriate way of lifting a cloud on a title. [FN9] If valid, these plats would make the boulevard a public street, not their private property. However, the Hansons and the Jeromes contended, these plats were not valid because the road commission had never accepted them in a timely manner. Even if the road commission had accepted the plats in a timely manner, the Hansons and the Jeromes argued, the road commission had abandoned the boulevard no later than when it recorded the July 1940 resolution in 1954, making the boulevard their private property for decades. Further, they contended that there was no evidence that the township had ever accepted the boulevard either formally or informally, and thus abandonment by the road commission was sufficient to make this property private. Because this was private property, the Hansons and the Jeromes maintained that an action to quiet title was the appropriate way to clarify as a matter of law that they owned the boulevard in fee simple.

Nevertheless, the state parties argued that the LDA has a separate process for vacating, correcting, or revising a "recorded plat." [FN10] In other words, the state parties essentially contended that the Hansons and the Jeromes were seeking to have the portion of the boulevard vacated from the plats to return the boulevard to private property. According to the state parties, the boulevard was public land because it had been dedicated to the public, formally accepted in 1937 or accepted by other informal means, excluded from the roads the road commission indicated it intended to vacate in the August 1940 resolution, and never vacated in the

1940 judicial proceeding vacating other public streets in the subdivision. Even if the road commission had abandoned the property, the state parties maintained, the boulevard would have reverted to township ownership, and would not have become private property. As a result, the state parties argued that the Hansons and the Jeromes could bring an action to vacate, correct, or revise the plats under the LDA, but could not bring an action to quiet title to the boulevard as a way to eliminate any effect the plats would have on the title to their respective pieces of property. Implicit in the state parties' argument was the assertion that actions to quiet title must be between private landowners concerning private property, and cannot concern public property.

***4** When the trial court ruled on this issue before trial, it did so in the context of a motion for summary disposition under MCR 2.116(C)(4), in which the state parties challenged the trial court's jurisdiction to hear the quiet title action. The trial court did not see conclusive proof of either theory regarding the proper legal basis on which to proceed because there was a factual debate in the record concerning whether the boulevard was private or public. As the trial court said, the arguments in favor of quieting title had "some merits [because of the argument] ... that it's private property," citing the argument by the attorney for the Hansons and the Jeromes that they were "claiming it [the boulevard] under a private chain of title." The trial court recapitulated this reasoning, saying:

> ... Mr. Carey [the attorney for the Hansons and the Jeromes] is asserting that it's [the boulevard] private and it's been private since at least 1954, and they've [the Hansons, Jeromes, and their predecessors] maintained it. And, not only do they have the [July 1940] resolution, they relied on the resolution which was the only thing of record, and they relied on the [1979] deed....

The trial court, acknowledging that the Hansons and the Jeromes had expressly selected quieting title as the legal basis for their action, said that they were "stuck with" that theory and had even conceded that if the trial court found the land to be public, then they would be "dead," meaning that they would lose on the claim. The trial court, responding to an argument by the plaintiffs' attorney that only the Hansons' deed--and not the Jeromes' deed--reflected ownership of any part of the boulevard, said that it was likely to receive evidence from a surveyor, and that the Hansons and the Jeromes still shouldered the burden at trial of proving the land was private. Though the state parties challenged the validity of the 1979 warranty deed purporting to grant the Hansons part of the boulevard, the trial court noted that the Hansons and the Jeromes had identified the July 1940 resolution that the road commission had recorded in 1954 as a legal basis for the description of the property in the 1979 warranty deed.

The state parties also maintained that even if the road commission had abandoned the boulevard, it would revert to Grayling Township, not the Hansons and the Jeromes as the abutting property owners, because the township was presumed to have accepted the dedication. The state parties asserted that the only way to contradict the township's presumed acceptance of the dedication was through an action under the LDA. The trial court, however, believed that this was simply part of the factual dispute that would be settled at trial. Accordingly, the trial court denied the motion for summary disposition.

Following the bench trial, the trial court issued written factual findings in an opinion. In the opinion, the trial court acknowledged the state parties' jurisdictional challenge to the proceeding as a quiet title action. While the trial court clearly concluded that the quiet title action was the proper form for the case, which is why the trial court invoked its equitable powers, [FN11] the trial court did not explain why it rejected the state parties' argument that the LDA applied.

***5** Further, the trial court never directly found whether or how the road commission accepted the dedication of the boulevard. Instead, the trial court found that Grayling Township had accepted part of the boulevard informally by paving it in 1966, but had not accepted the land on either side of this paved area. In reaching this decision, the trial court rejected testimony that fire trucks had used the boulevard earlier in the century to access the lake, noting that the trees alongside the paved area were as much as six feet in diameter, logically precluding any use by vehicles for many, many years. The trial court cited the public use of the paved strip and the failure of the Hansons and the Jeromes to object to that use as further evidence that the paved area had

been made public.

C. Jurisdiction

The parties' dispute regarding whether this was properly an equitable action to quiet title or should have been an action under the LDA is not at all new. In *Binkley v. Asire,* [FN12] the plaintiffs brought an equitable action to quiet title against a township, board of county road commissioners, board of county supervisors, and other landowners concerning platted land that had been dedicated to the public. [FN13] The plaintiffs also asked for relief under the statutory scheme governing plats then in effect. [FN14] The plaintiffs asked the circuit court to vacate the plat and revise it to grant them title to the disputed property, alleging that the public had never used the platted land, that the land could be used in a better way if made private, and that the township had never accepted the dedication. [FN15] The plaintiffs also asked the trial court to do equity in the case. [FN16] The trial court, however, concluded that

> the proceeding was not in fact one to quiet title but, rather, for the vacating, amending and revising of the plat, calling attention to the fact that he had authority to transfer the case to the law side of the court. However, based on the language of the statute relating to the power of the court to vacate or alter plats, he [the trial court judge] expressed the opinion that such a proceeding may be maintained in equity. [FN17]

As a result, the trial court treated the case as an action to quiet title, finding support in the evidence to vacate certain parts of the plat. [FN18] By "decree," the trial court "vacat[ed], revis[ed], and alter[ed]" the plat as the plaintiffs had requested. [FN19]

On appeal, the Michigan Supreme Court in *Binkley* questioned the trial court's decision to treat the case as an action to quiet title. [FN20] The Supreme Court phrased the issue as "whether equity ... has jurisdiction to entertain a petition for the vacating, altering, amending, or revising of a plat. [FN21] Considering language in the version of the plat act then in effect, the Supreme Court noted that

> [t]here is no provision in the statute specifying that a party desiring to obtain relief by way of the vacating, altering, amending, or revising of a plat may invoke the aid of equity.... Had it been intended to invest equity with jurisdiction, we have no doubt that appropriate language to that end would have been used. The fact that this was not done indicates the absence of any such intent. The prior decisions of this Court clearly recognize such a proceeding under the plat act as an action at law of special character. [FN22]

***6** Accordingly, the Supreme Court concluded that the trial court had erred in treating the case as an equitable action to quiet title, rather than a legal action under the plat act.

This conclusion did not end the analysis in *Binkley.* Rather, the Supreme Court then proceeded to examine the consequences of this error, determining that the proceedings amounted to "a trial of the controversy on the merits. [FN23] Because this error did not deprive appellant, or any other party to the case, of any substantial right or privilege, the Supreme Court declined to require the parties to try the case again. [FN24] Instead, the Supreme Court set aside the trial court's decree, remanded the case to be transferred to the law side of the trial court on a party's motion, and allowed the trial court at law to consider the facts of the case under the plat act. [FN25] The Supreme Court did not retain jurisdiction in the matter.

Binkley has garnered virtually no attention since its publication in 1952. It has been cited only once in subsequent published case law, and not for the proposition that the statutory process is the proper manner to vacate a plat. [FN26] *Kraus v. Dep't of Commerce,* [FN27] a seminal case in this area of property law, did not address this issue, even though the trial courts in one of the underlying actions had acted in equity, quieting title to the disputed land. This Court considered a similar question in *Hill v.. Houghton Twp,* [FN28] but did so without mentioning *Binkley,* which led to an inconsistent result. In *Hill,* plaintiff Raymond Hill brought a quiet title action under M.C.L. § 600.2932 against Houghton Township and Keweenaw County, alleging that he had acquired title to a piece of property described as a "public square" through adverse possession. [FN29] The township and the county moved for summary disposition, arguing that it is legally impossible to obtain public land by adverse possession. [FN30] The trial court agreed that Hill could not acquire this public land by adverse possession, and added that it thought that Hill's suit was nothing more than "an attempt to amend a duly recorded plat and fails to comply with

the requirements of the Michigan Plat Act.... [FN31]

On appeal, Hill presented a novel argument concerning why the land at issue should be excluded from the prohibition in case law against acquiring public land by adverse possession. [FN32] This Court rejected that argument, agreeing with the trial court that Hill could not acquire the land by adverse possession. [FN33] Despite this neat conclusion to the case, this Court observed that the trial court's alternative grounds for its ruling, which concerned Hill's failure to plead a cause of action under the plat act, was erroneous. [FN34] This Court explained that Hill's complaint did not invoke the plat act and plaintiff, therefore, was not required to comply with any of the act's prerequisites before bringing suit. [FN35] Rather, defendants in this sort of case may assert as an affirmative defense, alleged application of and noncompliance with the Michigan Subdivision Control Act of 1967 and, particularly, 221-228. [FN36] In sum, the *Hill* Court announced its perspective that: (1) trial courts have jurisdiction to take this sort of case as a quiet title action on the basis of the theory that the property at issue is privately owned; (2) the defendants may claim that the property is actually in a recorded plat, as having been dedicated to the public and accepted by a proper authority, and use the Subdivision Control Act as an affirmative defense to the quiet title action; and (3) the trial court has the ultimate responsibility of finding whether the property at issue is private or public because it was dedicated in a plat, and therefore whether the plaintiff's failure to follow the LDA process was fatal to the claim of ownership to the property. Aside from the fact that this Court has absolutely no authority to depart from Supreme Court precedent, [FN37] this conclusion was nonbinding dictum because the Court affirmed the trial court on the basis of the adverse possession issue, and therefore the jurisdictional issue was not essential to the holding. [FN38]

***7** [2][3] As we see it, even though today's courts no longer observe the procedural distinctions between actions at law and equity that were prominent in *Binkley*, [FN39] *Binkley* controls the outcome of this case, and we need not address the remaining issues. Because the Hansons and the Jeromes sought to vacate or otherwise alter the plats dedicating the boulevard to the public, they should have brought their countercomplaint pursuant to the LDA. However, because the bench trial in this case was full and fair, like the *Binkley* Court, we see no reason to remand for all new proceedings under the LDA. That the arguments in the trial court suggest that the Hansons and the Jeromes purposefully chose not to proceed under the LDA only confirms this as the correct course of action. Rather, on remand, if the Hansons and the Jeromes amend their pleadings to include a claim to vacate, revise, or alter the plats under the LDA, the trial court may then reconsider the evidence within this statutory framework, taking additional evidence only if necessary. In doing so, the trial court would be well advised to consider whether the November 19, 1937, resolution by the board of the road commission constituted a formal acceptance of the boulevard under the McNitt Act. [FN40] We express no opinion regarding whether either the road commission or the township accepted part or all of the boulevard in a sufficiently timely manner following the dedication, or what effect the various factors regarding the road commission's alleged abandonment of the boulevard have on the outcome of this case under the LDA.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

FN1. See *Jacobs v. Lyon Twp. (After Remand)*, 199 Mich.App. 667, 502 N.W.2d 382 (1993).

FN2. The Department of Commerce is now called the Department of Consumer and Industry Services.

FN3. Although none of the parties or the trial court noted it, the road commission expressly stated as one of its affirmative defenses:
1. That the real property complained of in Plaintiffs' amended complaint [the disputed boulevard] is not within the jurisdiction or ownership of Defendant Road Commission for Crawford County.
2. That the real property complained of in Plaintiffs' amended complaint *has previously been properly vacated and title*

vested in Co-Defendants Jerome and Hanson. [Emphasis added.]

FN4. Evidently, Grayling Township agrees with the state parties' position.

FN5. *In re Jude,* 228 Mich.App. 667, 670, 578 N.W.2d 704 (1998).

FN6. MCL 600.2932(1).

FN7. MCL 600.2932(5).

FN8. Black's Law Dictionary (6th ed, 1990), p 255.

FN9. See Black's Law Dictionary (6th ed, 1990), p 255; see also *Emig v. Frank P Miller Corp.*, 238 Mich. 695, 214 N.W. 144 (1927) (explaining concept of "cloud on title" and an action to quiet title as the appropriate remedy).

FN10. See M.C.L. § 560.221.

FN11. See *McKay v. Palmer,* 170 Mich.App. 288, 293, 427 N.W.2d 620 (1988) ("A suit to quiet title or remove a cloud on a title is one in equity and not at law.").

FN12. *Binkley v. Asire,* 335 Mich. 89, 55 N.W.2d 742 (1952).

FN13. *Id.* at 91, 92-93, 55 N.W.2d 742.

FN14. *Id.* at 93, 55 N.W.2d 742.

FN15. *Id.* at 92, 55 N.W.2d 742.

FN16. *Id.*

FN17. *Id.* at 93, 55 N.W.2d 742 (citation omitted).

FN18. *Id.* at 93-94, 55 N.W.2d 742.

FN19. *Id.* at 94, 55 N.W.2d 742.

FN20. *Id.* at 96, 55 N.W.2d 742.

FN21. *Id.*

FN22. *Id.* at 96-97, 55 N.W.2d 742.

FN23. *Id.* at 97, 55 N.W.2d 742.

FN24. *Id.* at 97-98, 55 N.W.2d 742.

FN25. *Id.* at 98, 55 N.W.2d 742.

FN26. See *In re Gondek,* 69 Mich.App. 73, 74, 244 N.W.2d 361 (1976) (considering burden of proof under Subdivision Control Act).

FN27. *Kraus v. Dep't of Commerce,* 451 Mich. 420, 423, 442, 444, 547 N.W.2d 870 (1996).

FN28. *Hill v. Houghton Twp.,* 109 Mich.App. 614, 311 N.W.2d 429 (1981).

FN29. *Id.* at 615, 311 N.W.2d 429.

FN30. *Id.* at 616, 311 N.W.2d 429.

FN31. *Id.;* see 1929 PA 172.

FN32. *Hill, supra* at 616, 311 N.W.2d 429.

FN33. *Id.* at 617, 311 N.W.2d 429.

FN34. *Id.* at 618, 311 N.W.2d 429.

FN35. *Id.*

FN36. *Id.*

FN37. See *People v. Beasley,* 239 Mich.App. 548, 556, 609 N.W.2d 581 (2000).

FN38. See *McGoldrick v. Holiday Amusements, Inc.,* 242 Mich.App. 286, 292 n. 2, 618 N.W.2d 98 (2000).

FN39. See Const 1963, art 6, § 5; MCL 600.223(4); MCR 2.101(A).

FN40. See *Christiansen v. Gerrish Twp.,* 239 Mich.App. 380, 383 n. 2, 385, 608 N.W.2d 83 (2000) (McNitt Act, 1931 PA 130, allowed counties to assume control over township roads and other public roads in recorded plats).

2003 WL 271317, 255 Mich.App. 271, 2003 WL 271317 (Mich.App.)

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Not Reported in N.W.2d
(Cite as: 1999 WL 33444353 (Mich.App.))

Court of Appeals of Michigan.

Thomas C. ROSE and Kathleen Ann Rose,
Plaintiffs-Appellees,
v.
Robert J. GREEN, Defendant-Appellant,
and
Doreen K. GREEN, Defendant.

No. 206524.

May 18, 1999.

Before: MARKEY, P.J., and HOLBROOK, Jr. and NEFF, JJ.

PER CURIAM.

***1** Defendants appeal as of right from an order granting summary disposition to plaintiffs. We affirm.

This dispute involves two easements across plaintiffs' lakefront property that were created by a subdivision plat in 1925. Defendant owns a parcel across the street, and claims a right to walk across plaintiffs' land to reach Walter's Lake.

I

We review de novo a grant of summary disposition. *Carlyon v. Mutual of Omaha,* 220 Mich.App 444, 446; 559 NW2d 407 (1996). When reviewing a motion for summary disposition brought pursuant to MCR 2 .116(C)(10), we must consider the pleadings, affidavits, admissions, depositions and any other documentary evidence available in a light most favorable to the nonmoving party in order to determine whether there is a genuine issue with respect to any material fact. *Quinto v. Cross & Peters Co,* 451 Mich. 358, 362; 547 NW2d 314 (1996). All reasonable inferences must be made in favor of the nonmoving party. *Bertrand v. Alan Ford, Inc,* 449 Mich. 606, 617-618; 537 NW2d 185 (1995).

II

Defendant first argues that the trial court erred in granting summary disposition to plaintiffs because, as a lot owner in the subdivision, defendant has the right to use the easements at issue. We disagree.

An easement is an interest in land that gives one proprietor some right to use the estate of another. *Young v. Thendara,* 328 Mich. 42, 50-51; 43 NW2d 58 (1950). Express easements are created only when there is language in the writing that manifests a clear intent to create the easement, such that no other construction can be placed on the face of the instrument that created the easement. *Forge v. Smith,* 458 Mich. 198, 205, 205 n 17; 580 NW2d 876 (1998). The writing can be in the form of a subdivision plat if it was properly recorded. *Walker v. Bennett,* 111 Mich.App 40, 43; 315 NW2d 142 (1981). Express easements created by subdivision plat have all the force of any other express grant, and, therefore, are binding on the original owners as well as all persons claiming through them. *Kirchen v. Remenga,* 291 Mich. 94, 109- 110; 288 NW 344 (1939).

Here, the subdivision plat was properly recorded, and the fact that the easements are clearly delineated and labeled indicates an unmistakable intent on the part of the original owners to create the easements in question. Therefore, they are express easements and they are binding on all persons claiming through the original owners, including plaintiffs. However, the existence of binding easements does not lead necessarily to the conclusion that any lot-owner may use the easements on plaintiffs' property, because an easement, like any interest in land, can be enforced only by those to whom it was conveyed. See *Choals v. Plummer,* 353 Mich. 64, 70-71; 90 NW2d 851 (1958). Therefore, we must determine for whose benefit the easements at issue were created, which is determined by ascertaining the grantors' intent. *Id.*

In order to determine the intent of the grantors, we must construe the language of conveyance in light of the circumstances that existed when the grant was made in order to arrive at a logical interpretation. *Choals, supra* at 71. In this case, the grantors did

not express an intent to dedicate the easements to all lot-owners. The language of dedication, which was handwritten on the subdivision plat, dedicated only the streets, intersections, canals, and parkways to the use of all property owners. An examination of the plat leads logically to the conclusion that the easements were not intended for public use. All of the parcels dedicated expressly for public use are indicated by a solid line, and do not run across any lot. This includes the "promenade," a footpath that directly encircles the lake. Defendant argues that the fact that the promenade was not included in the dedication, when plaintiffs admit it was for public use, means that the easements were just as likely overlooked, rather than deliberately left out of the dedication language. We disagree. The promenade, like other public areas, was indicated by solid lines, and did not run across any lot. Further, the nature of the promenade does not allow for any other reasonable explanation. The same cannot be said of the easements.

***2** The easements occur only in the area of the subdivision in which there are two lots, rather than one, between the lake and the road. Further, they were placed directly on the lots involved and are indicated by dashed lines. For these reasons, it is logical to interpret the easements as existing to provide ingress and egress to the landlocked, lakefront lots, and as extending the entire way to the lake to allow further splitting of these lots. It cannot be said that the grantors showed a clear and unequivocal intent to dedicate these easements to all property owners in the subdivision. See *Att'y Gen'l ex rel Dep't of Natural Resources v Cheboygan Co Bd of Rd Comm'rs,* 217 Mich.App 83, 88; 550 NW2d 821 (1996).

Defendant argues further that, even though the easements were not dedicated to the lot-owners, and even if the grantors did not intend the easements to benefit all lot-owners, the easements confer usage rights on the other lot- owners by operation of law. Lot-owners can acquire rights beyond those in their deeds when they purchase land in a platted subdivision. *Pulcifer v. Bishop,* 246 Mich. 579, 582; 225 NW 3 (1929). See also *Nelson v. Roscommon Co Rd Comm,* 117 Mich.App 125, 131; 323 NW2d 621 (1982). As originally stated in Michigan, the rule was that, by the act of platting and selling lots, an owner dedicated streets and ways to those who purchased from the owners, even when there was no dedication to the public. *Pulcifer, supra* at 582-583. The Supreme Court subsequently extended the rule to apply to parks. *Petition of Engelhardt,* 368 Mich. 399, 402; 118 NW2d 242 (1962). Defendant's argument, in essence, urges this Court to extend this rule to any easement on any plat. We decline to do so. Such a broad application of the rule could contravene intent of owners to establish easements only as between certain lots in the subdivision for much less public purposes than those served by streets and parks. The trial court did not err in holding that the other lot-owners in the subdivision do not have a right to use the easements on plaintiffs' land.

III

Next, defendant argues that summary disposition was erroneously granted to plaintiffs because a question of material fact existed regarding whether defendant's use of the easements over his lifetime has created a prescriptive easement to his benefit. Again, we disagree.

Prescriptive easements arise from the open, notorious, continuous, and adverse use of another's property for a fifteen-year period. *Goodall v. Whitefish Hunt Club,* 208 Mich.App 642, 645; 528 NW2d 221 (1995). The principle that underlies the doctrine is that, when one person actually uses or possesses the land of another in a way that is openly adverse to another's ownership for such a long time, "the law presumes that the true owner, by his acquiescence, has granted the land, or interest in the land, so held adversely." *Turner v. Hart,* 71 Mich. 128, 138; 38 NW 890 (1888).

***3** Because of the nature and purpose of the doctrine, the fifteen-year time period does not begin to run until the owner of the servient estate (in this case, plaintiffs) has actual notice of the adverse use. *Menter v First Baptist Church of Eaton Rapids,* 159 Mich. 21, 25; 123 NW 585 (1909). While actual notice "may be determined by the character of the use," the use must be "so open, notorious, and hostile as to leave no doubt in the mind of the owner of the land that his rights are invaded." *Id.*

The trial court held that defendant's use of plaintiffs' land to walk to the lake was not continuous enough to give rise to a prescriptive easement. On appeal, defendant makes a reasonable argument that the use was continuous, based on the rule that continuity is determined with reference to

"the nature and character of the right claimed." *Dyer v. Thurston,* 32 Mich.App 341, 344; 188 NW2d 633 (1971). An easement may be said to be used continuously even when it is only used seasonally if, as in the present case, the property only lends itself to seasonal use, as was the case with defendant's property. See *id.*

However, we do not believe that it is helpful to discuss one element of prescriptive easement in isolation. The real question is whether defendant's use, in addition to being adverse, was open, notorious, and continuous enough that it put the landowners on notice that their rights had been invaded, followed by a fifteen-year period in which the landowners took no legal action to protect their property rights. See *Menter, supra* at 25.

The party claiming that a prescriptive easement has arisen has the burden of establishing the elements of prescriptive easement. *Widmayer v. Leonard,* 422 Mich. 280, 290; 373 NW2d 538 (1985). Defendant presented no evidence that he was using the easement without the permission of the previous owners, and prescriptive easements can never arise from permissive use. *Menter, supra* at 25. Therefore, no prescriptive easement could have existed to bind plaintiffs as successors in interest to previous owners.

The evidence showed that plaintiffs actually knew of the use in 1989, seven years before they filed this cause of action. The circumstances in this case are not such that actual notice can be inferred before 1989. See *Mentor, supra* at 25. Although defendant made no attempt to hide his use of the shortcut, his use was not so continuous as to make it reasonable to assume that plaintiffs must have actually seen him use the shortcut before. He never used the shortcut more than twelve times per year after the age of five, at which time plaintiffs had not yet acquired their property. Nor did defendant's use leave visible marks so that it would be reasonable to expect plaintiffs to have seen evidence of his passing and to have investigated.

After examining the facts in the light most favorable to defendant as the nonmoving party, we find no genuine issue of material fact as to whether a prescriptive easement had arisen. Accordingly, plaintiffs were entitled to judgment as a matter of law.

***4** Affirmed.

1999 WL 33444353 (Mich.App.)

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